FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MDD/152947

PRELIMINARY RECITALS

Pursuant to a petition filed July 24, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Disability Determination Bureau in regard to Medical Assistance, a hearing was held on November 12, 2013, at Racine, Wisconsin.

The issue for determination is whether the Disability Determination Bureau correctly denied Petitioner's application for disability-based Medicaid benefits.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: DDB by file

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Racine County.
2. On November 23, 2012, Petitioner filed an application for disability-based Medicaid benefits, alleging a disability cause by multiple sclerosis. (DDB file)
3. On July 18, 2013, the DDB sent Petitioner a letter indicating that her application was denied because she did not meet the criteria for being determined legally disabled. (DDB file)

4. On July 24, 2013, Petitioner filed a request for reconsideration, alleging memory loss, vision problems, depression, spastic muscles throughout her whole body, severe and frequent headaches and severe fatigue. (DDB file)

5. On October 2, 2013, the DDB again denied Petitioner's application and on October 22, 2013, the DDB forwarded Petitioner's file to the Division of Hearings and Appeals for review. (DDB file)

DISCUSSION

A person between ages 18 and 65, with no minor children, must be blind or disabled to be eligible for MA. In order to be eligible for Medicaid as a disabled person, an applicant must meet the same tests for disability as those used by the Social Security Administration to determine disability for Supplemental Security Income (Title XVI benefits). *§ 49.47(4)(a)4, Wis. Stats.* Title XVI of the Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairments which can be expected to either result in death or last for a continuous period of not less than 12 months.

Although the determination of disability depends upon medical evidence, it is not a medical conclusion; it is a legal conclusion. The definitions of disability in the regulations governing MA require more than mere medical opinions that a person is disabled in order to be eligible. There must be medical evidence that an impairment exists, that it affects basic work activities, that it is severe, and that it will last 12 months or longer as a severe impairment. Thus, while the observations, diagnoses, and test results reported by the Petitioner's physicians are relevant evidence in determining impairment, the doctors' opinions as to whether the petitioner is disabled for the purposes of receiving MA are not relevant.

The DDB appears to have found Petitioner to suffer from a severe impairment, but it also found that despite the impairment, Petitioner is still able to engage in substantial meaningful activity based upon the tests described below.

Under the regulations established to interpret Title XVI, a claimant's disability must meet the 12-month durational requirement before being found disabling. In addition, the disability must pass five sequential tests established in the Social Security Administration regulations. Those tests are as follows:

1. An individual who is working and engaging in substantial gainful activity will not be found to be disabled regardless of medical findings. *20 CFR 404.1520 (b)*.

2. An individual who does not have a "severe impairment" will not be found to be disabled. A condition is not severe if it does not significantly limit physical or mental ability to do basic work. *20 CFR 416.921(c).*

3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and meets or equals a listed impairment in Appendix I of the federal regulations, a finding of disabled will be made without consideration of vocational factors (age, education, and work experience.) *20 CFR 404.1520(d).*

4. If an individual is capable of performing work he or she has done in the past, a finding of not disabled must be made. *20 CFR 404.1520(f).*

5. If an individual's impairment is so severe as to preclude the performance of past work, other factors, including age, education, past work experience and residual function capacity must be considered to determine if other types of work the individual has not performed in the past can be performed. *20 CFR 404.1520(g).*

These tests are sequential. If it is determined that an applicant for MA is employed or does not suffer from a severe impairment it is not necessary to proceed to analyze the next test in the above sequence.

TEST 1

The first test asks whether an individual is working and engaging in substantial gainful activity.

"Substantial activity" is defined as, "work activity that involves doing significant physical or mental activities. Your work may be substantial, even if it is done part time basis….." *20 CFR 404.1572(a)*

"Gainful work activity" is defined as, "work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized." *20 CFR 404.1572(b)*

Earnings can be used to determine whether a person is engaging in substantial gainful activity. *20 CFR 404.1574(a) and (b).* The 2011 substantial gainful activity (SGA) income limit was $1040 per month. (*Please see* www.ssa.gov/pressoffice/factssheet/colafacts2013.htm)

Petitioner is not working. As such, she passes test 1.

TEST 2

Petitioner passes test 2 because the DDB appears to have found that she does have a severe impairment. (DDB file, Case Development Worksheet, Entry 10/17/13)

TEST 3

The question presented here is whether petitioner's impairment meets the criteria listed in Appendix 1 to Subpart P of Part 404 of the Code of Federal Regulation (CFR). If Petitioner meets the aforementioned criteria, tests 4 and 5 do not need to be done; she qualifies as disabled. If Petitioner does not meet the criteria, then she must pass tests 4 and 5 to be considered disabled.

Appendix 1, subsection 11.09 deals with multiple sclerosis. It states that in order to qualify for MA, a person with multiple sclerosis must also have:

A. Sensory or motor aphasia resulting in ineffective speech or communication; or significant and persistent disorganization of motor function in two extremities, resulting is sustained disturbance of gross and dexterous movements, or gait and station.
B. Visual impairments such as visual acuity of the better eye, after correction is 20/200 or less, a contraction of the visual field, a loss of visual efficiency in the better eye of 20% after correction or visual hallucinations OR
C. Significant reproducible fatigue of motor function with substantial muscle weakness on repetitive activity, demonstrated on physical examination, resulting from neurological dysfunction in areas of the central nervous system known to be pathologically involved by the multiple sclerosis.

CFR, Appendix 2 to Subpart B of Part 404 (11.09)

Petitioner does not meet the criteria under paragraph A:

First, Petitioner testified at the hearing and did not appear to have any aphasia (difficulty articulating an idea). On the contrary, her speech was understandable, fluent and clear. Second, none of the medical reports indicate that Petitioner exhibits spasticity, rigidity or involuntary movements (i.e. tremors); as

such, there is no persistent disorganization in motor function of two of petitioner's extremities. The medical reports did not note any abnormality in Petitioner's gait. Specifically, an exam conducted on July 9, 2013, noted that Petitioner was, "able to walk pretty well without any assistive devices." It should be noted that Petitioner testified that she is able to get around her home safely with the use of a cane.

Petitioner does not meet the criteria under paragraph B:

Petitioner's medical records from a medical exam conducted on October 12, 2013, indicated that Petitioner has visual acuity of 20/20 in the right eye and 20/25 in the left eye with corrective lenses. This would appear to be correct, given Petitioner's testimony that she is able to read for about an hour before going to bed.

The information in the record is deficient and vague with regard to fatigue of motor function. Consequently, it is unclear whether Petitioner satisfies the criteria under Paragraph C:

It does not appear that the physicians who examined Petitioner performed any tests to see if Petitioner exhibited a significant decrease in motor function and muscle weakness after engaging in repetitive activities, although Petitioner testified to becoming very fatigued after small amounts of exertion. The absence of such testing is troubling given that it has been reported "that fatigue is the single most common symptom of MS and the most likely symptom to interfere with activities of daily living." Dr. Steven R. Schwid, MD; Melissa Covington; Dr. Benjamin M. Segal, Dr. Andrew M. Goodman, *Fatigue in multiple sclerosis; Current Understanding and Future Directions,* Journal of Rehabilitation Research and Development, March/April 2002 at pgs. 211-214; *this article can also be found at* http://www.rehab.research.va.gov/jour/02/39/2/Schwid.htm.

Because the evidence is inconclusive with regard to whether Petitioner meets the listings under the Appendix 1 to Subpart P of Part 404 of Code of Federal Regulation, it is necessary to proceed to tests 4 and 5.

TEST 4

The fourth test asks whether Petitioner is capable of work she performed in the past. Per *40 CFR 404.1560 (b)(1),* the question more specifically, is did Petitioner engage in substantial gainful activity (significant physical or mental activities for which she could have been paid) within the past 15 years, and if so, can Petitioner continue to perform that work?

The DDB did not make a determination with regard to the fourth test. It may have deemed the fourth test to be irrelevant, because it determined under test 5, that Petitioner had sufficient residual functional capacity to NOT pass test 5; that is to be found NOT disabled.

Petitioner testified that she has been a homemaker for the last ten years, but in 2003 worked for a few weeks on an assembly line at Waterford Packing, packing medical supplies. Petitioner testified that prior to this she worked at another company, picking/packing orders. Petitioner testified that she was a homemaker between 1998 and 2003.

Petitioner testified that she is able to get herself out of bed, shower, groom herself and dress herself, before needing to sit and rest due to fatigue. Petitioner testified that her husband cooks meals, because she cannot stand for more than 15 minutes and she cannot sit for more than 20-30 minutes before feeling fatigued or uncomfortable. Consequently, if she did prepare meals it would take a long time. Petitioner further testified that she dusts when she needs to get up and walk around, but otherwise her husband cleans. Petitioner testified that her husband does laundry, because she can no longer lift the basket.

Based upon the foregoing, I find that Petitioner would not be capable of performing the work she performed in the past. Petitioner passes the fourth test.

TEST 5

This test asks whether Petitioner can perform any other work, despite her limitations.

Part 404, Subpart P, Appendix 2, §200, states:

> Where the findings of fact made with respect to a particular individual's vocation factors and residual functional capacity coincide with all the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled. However, each of these findings of fact is subject to rebuttal…Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled. In any instance where a rule does not apply, full consideration must be given to all of the relevant facts of the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations.
>
> ….
>
> If an individual's specific profile is not listed within this appendix 2, a conclusion of disabled or not disabled is not directed…an individual's ability to engage in substantial gainful activity …is decided on the basis of the principle and definitions in the regulations, giving consideration to the rules of specific case situations in this appendix 2. These rules…provide an overall structure for evaluation of those cases in which the judgments as to each factor do not coincide with those of any specific rule….

Thus, the ultimate question posed by Test 5 is whether Petitioner can engage in any type of substantial gainful activity at all.

The DDB file stated that based upon the criteria found in *Part 404, Subpart P, Appendix 2*, *part 202.21*, that Petitioner was not disabled because she is considered an individual approaching advanced age (age 50-54); has education consisting of a high school diploma or greater; has previously performed unskilled and semi-skilled labor and is capable of performing medium work.

The definition of medium work is found at 20 C.F.R. § 404.1567 and provides as follows:

> (c) *medium work*. Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do medium, light, and sedentary work.

Petitioner testified that there is very little that she is able to do, because she tires so easily and because she has pain from fibromyalgia. While I do not doubt that Petitioner has pain and tires easily, her medical records support the DDB's determinations. Petitioner's medical records indicate that her strength, tone, reflexes and motor integration are all within normal limits. Further, MRI's of Petitioner's spine do not show disease so severe so as to cause debilitating pain.

Based upon all of the foregoing, Petitioner does not pass test 5.

OTHER MATTERS

Petitioner should note that if her condition changes or a physician finds that she meets the listing criteria she can reapply for Medicaid benefits.

Petitioner should also note that Wisconsin Medicaid law will change significantly, effective January 1, 2013. On that date, a person is eligible for Wisconsin Medicaid if his/her income is at or below 100% of the federal poverty level; it will no longer be necessary that a recipient be under 19, elderly, blind, disabled, or a caretaker relative. The January 2014 version of Medicaid may be applied for online from November 18, 2013 onward at Wisconsin's website, https://access.wisconsin.gov.

In addition, a person may apply for subsidized private health insurance beginning on October 1, 2013, with coverage beginning effective January 1, 2014 (if you enroll by December 15, 2013). Late enrollments will be allowed until March 31, 2014, but will not be retroactive. Enrollment can be accomplished via the federal website, https://www.healthcare.gov or through the federal call center at 1-[redacted]. *Petitioner should expect delays when applying due to technical problems with the website.*

When applying, the program will want to know the petitioner's tax household's adjusted gross income for the last tax filing year. If things are working properly, the program should be able to see the household's adjusted gross income for the prior year via a federal "data hub." That income information will be used to assign a percentage of poverty level to the household, which in turn is used to calculate the amount of the premium subsidy that will be provided. A household at 101% of the federal poverty level (FPL), and which picks a "silver" insurance plan, will pay no more than 2% of gross income for its premium, as the rest will be covered by the subsidy. (As of February 1, 2013, 101% of FPL for a household of 2 was about $15,665 per year) The subsidy percentage tapers off as income rises. A household at 399% FPL, which picks a "silver" plan, will pay no more than 9.5% of its income for its premium.

When shopping for insurance via phone or website, the buyer will have a choice of plans labeled with various "medal" colors. Each color represents a different level of shared responsibility between the insurer and the insured for medical bills incurred. The breakdown is: Platinum-90% insurer/10% patient, Gold-80% insurer/20% patient, Silver-70/30, and Bronze-60/40. The idea behind this stratification is to allow the consumer to see "apples-to-apples" insurance comparisons. The patient's premium cost for a Platinum or Gold plan will be more than the percentages stated in the prior paragraph for a Silver plan.

The various insurance plans may also have varying co-payments and deductibles. If a household's income is below 250% FPL (about $38,775 per year as of February 1, 2013), there will also be a subsidy to help pay co-payments and deductibles. This subsidy is called a "cost sharing reduction" or CSR.

CONCLUSIONS OF LAW

The DDB correctly denied Petitioner's application for disability-based Medicaid benefits.

THEREFORE, it is **ORDERED**

That the petition is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative

Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee, Wisconsin, this 18th day of November, 2013.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 18, 2013.

Racine County Department of Human Services
Disability Determination Bureau